United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

74-2281, 75-6014-
ORIGINAL 75-6032

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PENT-R-BOOKS,

Defendant-Appellant.

On Consolidated Appeals from the United States District Court for the Eastern District of New York

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DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND FOR STAY OF MANDATE

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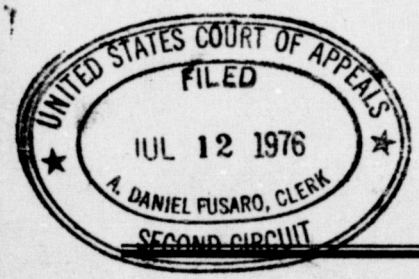

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, defendant-appellant hereby petitions for rehearing of this Court's order and judgment of June 28, 1976, especially insofar as it affirmed the judgments in the cases bearing docket numbers 75-6019, 75-6028—75,6030, noting below the points of fact and law which this Court has overlooked and misapprehended. In the event that this petition be denied, we respectfully request a stay of the mandate of this Court in its entirety, pending action

by the Supreme Court of the United States on a timely petition for certiorari.

1. In the case bearing docket number 75-6028 (72 C 603), the Post Office hearing officer had determined that the prohibitory order was received by Pent-R on April 22, 1969, and that the second mailing was received by the complaining addressee on June 5, 1969 (1441a)—only 44 days after the receipt of the prohibitory order by Pent-R. Accordingly, since this Court ruled the statutory presumption to be a 60 day presumption (pp. 4473-4475), judgment in this case should have been reversed.

We had not previously advanced this argument, but argued that there was no evidence from which the administrative judge could have made his finding of date of receipt by the addressee, a point not contested by the Government. This Court rejected our argument, however, ruling that we had presented nothing from which it could conclude that we were right (p. 4483, n. 22). However, there is absolutely nothing in the certified Post Office record from which the administrative judge could have reached this conclusion (1440a-1467a), and the complaining addressee did not testify at any point (1442a, 1444a). Thus, tnere was a total absence of evidentiary support for the conclusion.

2. This Court went on, in the same footnote, to affirm 75-6030 (72 C 610), noting our "complaint is that the date [of receipt of the second mailing] was supplied by Mrs. E. R. Oetken, while the addressee was listed as E. R. Oetken. In fact, the administrative record indicates that it was Mrs. E. R. Oetken who requested the prohibitory order. See Appendix at 1629a." Not so. The request for prohibitory order was signed by E. R. Oetken, appearing at 1641a. Since he was the original addressee (1642a), only he could have requested it; there is no au-

thority in the law for a wife to obtain an order prohibiting mailings to her husband. What appears at 1629a is a form request for prohibitory order signed by Mrs. Oetken on Oct. 8, 1969—under a frequent (and confusing) practice the Post Office had, pursuant to which the addressee signed a *second* request upon receipt of a second mailing. What appears at 1629a could not possibly be the request for the prohibitory order, since a) it was signed in October 1969, though the prohibitory order was dated in April 1969 (1639a); b) the second mailing was received on Oct. 6, 1969 by Mr. Oetken (1628a), and the request for prohibitory order at 1629a was dated Oct. 8, 1969—and surely, a second mailing before a prohibitory order was even requested cannot be a violation of the statute.

The Court plainly erred because of the confusing Post Office practice.

3. This Court ruled that Rule 902 of the Federal Rules of Evidence would be applicable under Public Law 93-595, 88 Stat. 1926 (p. 4477, n. 17), enacted in 1975. However, that statute provides, in its preamble, that the Federal Rules as thereby enacted were to apply to pending matters "except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply." We submit that application of the 1975 Rules to summary judgment motions submitted in 1973 is not feasible, and clearly works an injustice.

Pent-R was entitled, in 1973, to rely on the clear inadmissibility of the administrative records under the then-existing and governing Rule 44 of the Federal Rules of Civil Procedure. Though the original Federal Rules of Evidence had been ordered on November 10, 1972 by the Supreme Court, they were then applicable only to actions and proceedings brought after July 1, 1973—and all these

cases were brought long prior to July 1, 1973. Hence, Pent-R clearly had no burden, when the summary judgment motions were submitted, of submitting any evidence whatsoever, since the Government records were then neither admissible nor foreseeably admissible. To now affirm summary judgment against Pent-R because it did not produce evidence to rebut the Government's then non-admissible certified records, when the later admissability of those records was not even foreseeable, is surely to work an egregious injustice, especially when the statute now relied upon [Rule 902(4)] was not even enacted (much less effective) until months after the appeals were taken here.

Put another way, we note that by supplying inadmissible certified records in 1973, the Government clearly did not carry its preliminary burden of proof, and therefore Pent-R was then under no duty to submit evidence supporting its position. To now rule that Pent-R was under such duty in 1973, because of a 1975 amendment to the law, is to work a rank injustice.

4. Though the Court noted at p. 4465 that we argued that the issue is moot and that there is no case or controversy, the opinion does not deal with this question at all. We note, however, that at no point, either at oral argument or otherwise, has the Government even attempted to distinguish the Supreme Court's recent decision in *Rizzo* v. *Goode*, U.S. (1976), 44 U.S. Law Week 4095 (1/21/76), cited and discussed at pages 6-7 of our reply brief. There is no way in which these cases can be distinguished from *Rizzo*, or its predecessor case of *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), relied upon heavily in *Rizzo*.

5. This Court wrote at p. 4467 that it could not say that Judge Dooling erred in his assessment that Pent-R's

"liability to subjection to individual Compliance Orders of [the] Court is the begetter of [its] praiseworthy compliance effort . . .", in upholding Judge Dooling's exercise of discretion. However, there is simply not a scintilla of evidence in the record whatsoever to demonstrate that Pent-R's liability to subjection to individual Compliance Orders of the Court is the begetter of its compliance effort. On the contrary, Pent-R had eliminated names of unwilling addressees from its mailing lists even long prior to the enactment of the Pandering Law (57a); it has always been extremely careful of the sensibilities of persons who might otherwise be offended (58a); and all of its improvments in computer technology had been because of the defendant's good faith effort and diligence solely in attempting to completely comply with the Pandering Law (61a-63a, 65a). In order to comply with the law, it has even abandoned the use of most rental mailing lists (67a-68a), and has programmed the computers by even circumscribing what it claims to be its own First Amendment rights "in order to even better comply with the law" (71a-72a, 75a-76a). In the face of this record, Judge Dooling's finding was clearly erroneous; moreover, it means that good faith attempted compliance with law paradoxically helps insure an injunction issuing against the complier.

6. This Court noted that the number of valid complaints issued with respect to second mailings is less than one quarter of one percent (0.025%) of the number f prohibitory orders issued to Pent-R in the last five years; we had noted (Brief, p. 8) that this gave the Post Office the benefit of every doubt that it decided correctly every case of the 500 complaints of violation which it had upheld. However, the 28 cases below involved 28 motions for summary judgment; the Government lost seven of those cases, appealed to this Court, but with-

drew the appeals; and now, of the 20 cases that are before this Court, the Government has secured an affirmance on only four. Thus, the Government has lost 23 out of 28 cases, or some 82% of the cases, winning only some 18% of them—and these were cases produced in response to Judge Dooling's request that the first cases brought before him be the best the Government had to offer. Even if we then assume that the Government will prevail in 18% of all the cases in Court, given the alleged violation rate of less than one quarter of one percent (0.025%), then the violation rate as found by the Court would be less than five thousandths of one percent (0.0045%) (multiplying 18% x 0.025%). We urge that, in the light of this infinitesimal proportion of errors by Pent-R, Judge Dooling's issuance of injunctions either be considered an abuse of discretion, or else that the four cases be remanded for Judge Dooling to reconsider and reexercise his discretion in the light of the infinitesimal percentage of violations of prohibitory orders, which is *de minimis*.

7. We urge that this Court also reexamine its decision in the light of the intervening decision of the Supreme Court of the United States in *Virginia State Board of Pharmacy* v. *Virigina Citizens Consumer Council, Inc.*, U.S. , 44 U.S. Law Week 4686 (5/24/76), which held for the first time that commercial advertising was protected by the First Amendment. Thus, we believe that the constitutionality of the statute must now be reexamined in the light of the law that the mailers are exercising First Amendment rights. Accordingly, this Court should balance, as against the right of the addressee to be free from unwanted intrusion, the result of that unwanted intrusion—that he either returns the advertisement or tosses it in the nearest wastepaper basket—as against the many restrictions upon freedom of speech

that the Pandering Law, in its operation and effect, puts upon the mailer.

Only the other day, Mr. Justice Powell, in his concurring opinion in *Young* v. *American Mini Theatres, Inc.*, U.S. (6/24/76), 44 U.S. Law Week 4999, 5007, in explaining *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), which invalidated an ordinance prohibiting the showing of films containing nudity by drive-in theatres when the screens were visible from a public street or place, noted as follows:

> "* * * Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. *Id.*, at 210-212 * * *."

Here, the addressee is not a captive, and need only throw the second mailing into the wastebasket or mark it for return.

We noted in our brief (pp. 6-8, 16-18) that the effect of the law was to prevent mailings to millions of people, even though they had not obtained prohibitory orders. We now can cite judicial authority for the proposition that such violates the First Amendment. For a three judge federal court has recently ruled in *United States* v. *Treatman*, 408 F.Supp. 944, 954 (C.D. Cal., 1976) as follows:

> "And when the Government can prohibit the people from receiving material through the mail which the Government thinks should not be sent, and which the recipients have not asked to be protected from, the entire concept of free speech and free communication is dealt a devastating blow."

While this blow may not have been intended by Congress in its enactment of the Pandering Law, the operation and

effect of the statute is to prohibit millions of people from receiving materials through the mail by the Government giving such authority to complaining addressees, though the millions of others have not asked to be protected from such mailings.

8. In the event that this petition be denied, we respectfully request a stay of the mandate of this Court pending action by the Supreme Court on a timely petition for certiorari.

CONCLUSION

Rehearing should be granted, and the decisions below reversed and the complaints dismissed.

Respectfully submitted,

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DATED: July 12, 1976

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Attorney for